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3 UNITED STATES DISTRICT COURT

4 DISTRICT OF NEVADA

5  
6 CHARLES GARNER,

7 Petitioner,

\*\*\* Case No. 3:18-cv-00525-MMD-WGC

8 v.

9 STATE OF NEVADA, *et al.*,

10 Respondents.

11 ORDER

12 **I. Summary**

13 Before the Court is Respondents' motion to dismiss ground 3 in Petitioner Charles  
14 Garner's 28 U.S.C. § 2254 *habeas corpus* petition as unexhausted or procedurally  
15 defaulted. (ECF No. 36 (the "Motion").) As discussed below, the Motion is denied and a  
16 decision on ground 3 is deferred to the merits adjudication.

17 **II. Background**

18 In July 2008, Garner was charged with one count of murder with use of a deadly  
19 weapon; one count of discharging a firearm at or into a vehicle; one count of attempt  
20 murder with use of a deadly weapon; one count of battery constituting domestic violence  
21 with use of a deadly weapon resulting in substantial bodily harm; and one count of  
22 possession of a firearm by an ex-felon. (ECF No. 29 at 4.) In March 2008, Garner fired a  
23 gun into a vehicle, killing Anthony Wright, his estranged wife Roanna's boyfriend; Roanna  
24 was also shot and remained in a vegetative state until she died in May 2014. (*Id.*)

25 Just prior to trial, Garner entered into a guilty plea agreement in March 2013. (Exh.  
26 87).<sup>1</sup> The state agreed not to pursue the death penalty. (*Id.*) He then moved to withdraw

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28 <sup>1</sup>Exhibits referenced in this order are exhibits to Respondents' Motion (ECF No. 36) and are found at ECF Nos. 37-38.

1 his plea in May 2013. (Exh. 88.) The state district court denied the motion. (Exh. 104.)  
 2 The state district court sentenced Garner as follows: Count 1: life without the possibility  
 3 of parole, plus a consecutive sentence of a term of eight to 20 years for use of a deadly  
 4 weapon; Count 2: 28 to 72 months; Count 3: eight to 20 years, plus a consecutive eight  
 5 to 20 years for use of a deadly weapon; Count 4: six to 15 years; Count 5: 28 to 72  
 6 months; all counts to run consecutively. (Exh. 108.) Judgment of conviction was entered  
 7 on June 12, 2014. (Exh. 111.)

8                   The Nevada Supreme Court affirmed Garner's convictions in March 2015 and  
 9 affirmed the denial of his state postconviction *habeas corpus* petition in January 2020.  
 10 (Exhs. 120, 139.)

11                   Garner dispatched his federal *habeas corpus* petition for filing in February 2019.  
 12 (ECF No. 12.) The Court granted his motion for appointment of counsel, and he filed an  
 13 amended petition through counsel. (ECF Nos. 11, 18.) The Court granted Garner's motion  
 14 to stay and abey this action pending final resolution of his state-court proceedings. (ECF  
 15 No. 24.) After the stay was lifted, Garner filed a second-amended petition. (ECF Nos. 25,  
 16 27, 29.) Respondents now move to dismiss ground 3 as unexhausted or procedurally  
 17 barred. (ECF No. 36.) Garner opposed, and Respondents replied. (ECF Nos. 41, 42.)

18                   **III. Legal Standard**

19                   **a. Exhaustion**

20                   A federal court will not grant a state prisoner's petition for habeas relief until the  
 21 prisoner has exhausted his available state remedies for all claims raised. *Rose v. Lundy*,  
 22 455 U.S. 509 (1982); 28 U.S.C. § 2254(b). A petitioner must give the state courts a fair  
 23 opportunity to act on each of his claims before he presents those claims in a federal  
 24 habeas petition. *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999); see also *Duncan v.*  
 25 *Henry*, 513 U.S. 364, 365 (1995). A claim remains unexhausted until the petitioner has  
 26 given the highest available state court the opportunity to consider the claim through direct  
 27 appeal or state collateral review proceedings. See *Casey v. Moore*, 386 F.3d 896, 916  
 28 (9th Cir. 2004); *Garrison v. McCarthey*, 653 F.2d 374, 376 (9th Cir. 1981).

### b. Procedural Default

28 U.S.C. § 2254(d) provides that this Court may grant habeas relief if the relevant state court decision was either: (1) contrary to clearly established federal law, as determined by the Supreme Court of the United States; or (2) involved an unreasonable application of clearly established federal law as determined by the Supreme Court.

“Procedural default” refers to the situation where a petitioner in fact presented a claim to the state courts, but the state courts disposed of the claim on procedural grounds, instead of on the merits. *Coleman v. Thompson*, 501 U.S. 722, 730-31 (1991). A federal court will not review a claim for habeas corpus relief if the decision of the state court regarding that claim rested on a state law ground that is independent of the federal question and adequate to support the judgment. *Id.*

The *Coleman* Court explained the effect of a procedural default:

In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

501 U.S. at 750; see also *Murray v. Carrier*, 477 U.S. 478, 485 (1986). The procedural default doctrine ensures that the state's interest in correcting its own mistakes is respected in all federal habeas cases. See *Koerner v. Grigas*, 328 F.3d 1039, 1046 (9th Cir. 2003).

To demonstrate cause for a procedural default, the petitioner must be able to "show that some objective factor external to the defense impeded" his efforts to comply with the state procedural rule. *Murray*, 477 U.S. at 488. For cause to exist, the external impediment must have prevented the petitioner from raising the claim. See *McCleskey v. Zant*, 499 U.S. 467, 497 (1991).

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1                   **IV. Discussion**

2                   Garner acknowledges in his petition that ground 3<sup>2</sup> is unexhausted. (ECF No. 29  
 3 at 16.) He also agrees that if he were to return to state court to raise this claim in a second  
 4 state post-conviction petition, the state courts would find the claim procedurally defaulted  
 5 as untimely and successive. (ECF No. 41 at 3); see NRS § 34.726, 34.810. He thus  
 6 acknowledges, therefore, that the claim would also be procedurally barred from federal  
 7 review but argues that he can demonstrate cause and prejudice to excuse that default  
 8 based on ineffective assistance of state post-conviction counsel.

9                   The Court in *Coleman* held that ineffective assistance of counsel in post-conviction  
 10 proceedings does not establish cause for the procedural default of a claim. 501 U.S. at  
 11 750. However, in *Martinez v. Ryan*, the Court subsequently held that the failure of a court  
 12 to appoint counsel, or the ineffective assistance of counsel in a state post-conviction  
 13 proceeding, may establish cause to overcome a procedural default in specific, narrowly-  
 14 defined circumstances. 566 U.S. 1 (2012). The Court explained that *Martinez* established  
 15 a “narrow exception” to the *Coleman* rule:

16                   Where, under state law, claims of ineffective assistance of trial counsel must  
 17 be raised in an initial-review collateral proceeding, a procedural default will  
 18 not bar a federal habeas court from hearing a substantial claim of ineffective  
 19 assistance at trial if, in the initial-review collateral proceeding, there was no  
 20 counsel or counsel in that proceeding was ineffective.

21                   566 U.S. at 17.

22                   In *Clabourne v. Ryan*, 745 F.3d 362 (9th Cir. 2014), the Ninth Circuit provided  
 23 guidelines for applying *Martinez*, summarizing the analysis as follows:

24                   To demonstrate cause and prejudice sufficient to excuse the procedural  
 25 default, therefore, *Martinez* . . . require[s] that Clabourne make two  
 26 showings. First, to establish “cause,” he must establish that his counsel in  
 27 the state postconviction proceeding was ineffective under the standards of  
 28 *Strickland* [v. Washington, 466 U.S. 668 (1984)]. *Strickland*, in turn, requires

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27                   <sup>2</sup>Ground 3 alleges that Garner’s counsel was ineffective for failing to present  
 28 compelling mitigating evidence about the circumstances surrounding the shooting. (ECF  
 No. 29 at 16-34.)

1 him to establish that both (a) post-conviction counsel's performance was  
 2 deficient, and (b) there was a reasonable probability that, absent the  
 3 deficient performance, the result of the post-conviction proceedings would  
 4 have been different. Second, to establish "prejudice," he must establish that  
 his "underlying ineffective-assistance-of-trial-counsel claim is a substantial  
 one, which is to say that the prisoner must demonstrate that the claim has  
 some merit."

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 6 *Clabourne*, 745 F.3d at 377 (citations omitted).

7 Here, Garner argues that he can establish cause and prejudice under *Martinez* to  
 8 excuse the default of this claim and to demonstrate that this Court should review the claim  
 9 on the merits. (ECF No. 41.) Respondents contend that neither Garner's trial counsel nor  
 10 post-conviction counsel were ineffective, and therefore, ground 3 is not a substantial  
 11 claim. (ECF No. 42.)<sup>3</sup> However, Respondents agree with Garner that the resolution of the  
 12 claim should be deferred to the adjudication of the petition on the merits because the  
 13 claim is intrinsically linked to the merits analysis. The Court also agrees and declines to  
 14 dismiss ground 3 at this time. A decision on whether ground 3 is procedurally barred from  
 15 federal review is deferred.

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27       <sup>3</sup>The Court notes that it appears from the state-court record provided that Garner  
 28 did not have state post-conviction counsel. (Exhs. 122, 133); see also Nevada Supreme  
 Court Case No. 78540. If he had no post-conviction counsel, then he has already  
 demonstrated cause under *Martinez*.

1       **V. Conclusion**

2           It is therefore ordered that Respondents' motion to dismiss (ECF No. 36) is denied  
3 as set forth in this Order.

4           It is further ordered that Respondents have 60 days from the date this Order is  
5 entered within which to file an answer to the second-amended petition. Respondents may  
6 also address in the answer the issue of the potential procedural default of ground 3.

7           It is further ordered that Garner has 45 days following service of Respondents'  
8 answer in which to file a reply.

9           It is further ordered that Garner's motion to seal exhibits containing confidential  
10 medical information (ECF No. 32) is granted.

11           DATED THIS 23<sup>rd</sup> Day of April 2021.

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13           MIRANDA M. DU  
14           CHIEF UNITED STATES DISTRICT JUDGE

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